Supreme Court, U.S.
FILED
JUN 07 2000
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No. 99-1973

In The

Supreme Court of the United States

LARRY FESSLER AND SUSAN FESSLER,

Petitioners,

v.

BAYSHORE REALTY, INC., an Oregon corporation; CORY COMSTOCK, an individual; JOHN C. JENSEN, an individual; and DAVID O. QUINN, an individual,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF DAVID O. QUINN

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OBJECTIONS TO QUESTIONS PRESENTED

Respondent Quinn objects to the petitioners' questions presented due to the fact that neither of the questions raised by petitioners were pressed or passed on below.

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ARGUMENT

The Petitioners arguments in support of their Petition for *Certiorari* can be broken down basically into three categories: (1) *Reves v. Ernst & Young*, 507 U.S. 170 (1993) was incorrectly decided; (2) *Reves* has caused too much confusion among the federal courts and its holding should be reconsidered and either be overruled or modified; and (3) the Court of Appeals was in error when it affirmed the district court's ruling regarding petitioners' RICO conspiracy claim. Respondent Quinn (hereinafter "Quinn") will address each of these arguments in turn.

A. *Reves* Was Correctly Decided.

In *Reves*, the question presented was "whether one must participate in the operation or management of the enterprise itself to be subject to liability under [18 USC 1962(c)]."[1] *Id.* at 172. In reaching its decision, the Court considered whether they should adopt the holding in *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983) (operation or management test) or follow the holding in *Bank of America National Trust & Savings Assn. v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986) (rejecting the requirement that a RICO defendant participate in the operation or management of an enterprise). In reaching its decision, the Court

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[1] 18 USC 1962(c) states: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

examined the language of 18 USC 1962(c), the legislative history of this provision and RICO's "liberal construction" clause. It is unclear what else petitioners think the Court should have considered.

Petitioners seem to imply that if the *Reves* Court had fully considered the "liberal construction" clause, they would have adopted the holding in *Bank of America* and rejected the "operation or management" test. However, the Court did consider the "liberal construction" clause when reaching its conclusion that in order to "participate directly or indirectly in the conduct of such enterprise's affairs" a defendant must have some part in directing those affairs. See *id.* at 183-84. In regards to the "liberal construction" clause, the Court stated:

> RICO's 'liberal construction' clause does not require rejection of the 'operation or management' test. * * * This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. This clause 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.' *Sedima, S.P.R.L. v. Imex Co.*, 473 U.S. 479, 492, n. 10 (1985).

Id. at 183.

The Court also examined, in some detail, the statutory language involved. It finally concluded that the word "conduct" requires some degree of direction and the word "participate" requires that a person have some

part in that direction. *Id.* at 179. Petitioners may disagree with this conclusion (Justice Souter and Justice White also disagreed) but that does not mean that the holding is therefore inherently flawed.

The *Reves* Court thoughtfully and articulately reached its ruling. Petitioners fail to point out any cogent reason why the ruling in *Reves* is incorrect. *Certiorari* should not be granted on this basis.

B. *Reves* Has Not Generated Inconsistent Rulings.

Petitioners cite numerous cases in support of their argument that *Reves* needs to be reconsidered because it has generated inconsistent results among the various circuit and district courts. It is true that in some cases the courts have ruled that a defendant has participated in the operation or management of an enterprise and in other cases the courts have ruled that a defendant has not participated in the operation or management of an enterprise. There is nothing inconsistent about this. Each court has simply looked at the facts in each case and made a ruling based upon the holding in *Reves*. In some cases, like this one, the facts do not support the allegation that a particular defendant participated in the operation or management of an enterprise. Petitioners do not appear to be claiming that the courts are applying various legal standards. Instead they appear to be saying that courts are applying the same legal standard to differing facts and coming up with differing conclusions. There is nothing wrong with that, and it is surely not sufficient enough reason to modify *Reves*, and it is certainly not

reason enough to grant petitioners' Petition for Writ of *Certiorari*.

Reves does not state that all organizations/corporations that supply professional services to a RICO enterprise are immune from suit. *Reves* simply holds that "in order to 'participate directly or indirectly in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Reves*, 507 U.S. at 179. Each court must then look at the particular facts in the case and determine if the defendant did in fact participate in the operation or management of an enterprise. There is nothing inconsistent about that. Accordingly, *Certiorari* should not be granted on the basis that *Reves* has generated inconsistent case law.

C. Petitioners Did Not Raise With The Court Of Appeals The Issue Of Their Perceived "Problems" With *Reves*.

Quinn fully briefed the issue of whether he participated in an enterprise in his response brief to the Court of Appeals. Petitioners did not raise their concerns about the holding in *Reves* in their reply brief; and accordingly, the Court of Appeals did not have an opportunity to address petitioners' concerns. Petitioners should not now be able to raise for the first time all their objections to the holding in *Reves*. *See*: *U.S. v. Williams*, 504 U.S. 36, 112 S. Ct. 1735, 118 L.Ed.2d 352 (1992) (Traditional Supreme Court practice precludes granting *certiorari* when question presented was not pressed or passed on below.) Because petitioners did not raise their objections to *Reves* below, Quinn was never provided with the opportunity

to respond to petitioners' concerns and the Court of Appeals was never provided with the chance to rule on their arguments. This is an additional reason for denying the Petition for *Certiorari*.

D. The Court Of Appeals Was Correct In Upholding The District Court's Granting Of Summary Judgment Against Petitioners On Their RICO Conspiracy Claim.

In affirming the district court's granting of summary judgment against petitioners on their RICO conspiracy claim, the Court of Appeals stated:

> There is no evidence in the record that Quinn agreed to do anything with the other defendants or, that he ever had any contact with them except during the inspection of Jensen's house. In the absence of any evidence that Quinn met with the other defendants, spoke to them on the telephone or had some other form of interaction with them, there is no basis to conclude that Quinn possibly could have conspired in the manner that Plaintiffs allege. Plaintiffs do not point to any evidence directly supporting this claim.

Appendix A, page 8, Petition for *Certiorari*.

Accordingly, it does not matter in this case whether *Reves* undermines *Salinas v. United States*, 522 U.S. 52 (1997) as the petitioners' claim. The Court of Appeals did not base their opinion that Quinn was not a conspirator on the fact that he failed to participate in the operation or

management of an enterprise. They held he did not conspire because there was no evidence to support petitioners' claim that he did conspire. Consequently, petitioners' second question presented is not even applicable to this case. It may be an appropriate question to be resolved in some other case, but it is not an appropriate question for this case.

E. Petitioners Did Not Raise With The Court Of Appeals The Issue Of Whether The District Court Was In Error When It Held That Their Conspiracy Claims Could Not Stand.

The petitioners submitted three issues for review to the Court of Appeals. The first issue dealt with Oregon law governing claim preclusion. The second and third issues were stated as follows:

> 2. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs-appellants failed to establish the necessary pattern element of a RICO claim (both substantive and conspiracy).
>
> 3. Whether the district court erred in granting the defendants' appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs'-appellants failed to establish the necessary enterprise element of a RICO claim (both substantive and conspiracy).

Petitioners did not present a question regarding whether the district court was in error in holding

"because plaintiffs cannot satisfy the substantive RICO elements under subsection (a) and (c), the conspiracy claims under subsection (d) cannot stand." Appendix A, page 34a, Petition for *Certiorari*. In fact, petitioners did not raise this issue anywhere in their opening or reply briefs. See Appendix to this brief.

Petitioners are now raising for the first time in their Petition for *Certiorari* the issue of whether a conspiracy claim can survive if the substantive RICO claim does not. As with petitioners' issues with *Reves*, they cannot bring this issue up for the first time in the Petition for *Certiorari*. *See U.S. v. Williams*, 504 U.S. 36 (1992) (Traditional Supreme Court practice precludes granting *certiorari* when question presented was not pressed or passed on below.)

CONCLUSION

Basically petitioners want the Supreme Court to review findings of fact made by the Ninth Circuit Court of Appeals. They attempt to get around this by claiming that *Reves* is an incorrect statement of the law based on the reasoning behind RICO's "liberal construction" clause. The Supreme Court considered this clause when reaching its decision in *Reves* so petitioners' concerns are not well taken. Petitioners also did not raise the issue of the flaws in the *Reves* holding prior to their Petition. Accordingly, their question presented dealing with the need to clarify *Reves* should not be considered.

The Court of Appeals based their decision regarding petitioners' conspiracy claim on the fact there were no

facts to support petitioners' allegations that Quinn participated in a conspiracy. They did not base their decision on the fact that the underlying substantive RICO claim did not survive. Accordingly, petitioners' question presented regarding the conflict between *Reves* and *Salinas* should not be considered. An additional reason for not considering the second question presented is that this issue was neither pressed nor passed on below.

Dated this 7th day of July, 2000.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 99-35485

LARRY FESSLER and SUSAN FESSLER,

Plaintiffs-Appellants,

v.

BAYSHORE REALTY, INC. an Oregon corporation; CORY COMSTOCK, an individual; JOHN C. JENSEN, an individual; and DAVID O. QUINN, an individual,

Defendants-Appellees.

APPELLANTS' OPENING BRIEF

[Appeal from the United States District Court for the District of Oregon]

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I.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to

dismiss the plaintiffs'-appellants' RICO claims on the ground that this claim is barred under the doctrine of claim preclusion.

2. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs'-appellants failed to establish the necessary pattern element of a RICO claim (both substantive and conspiracy).

3. Whether the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss the plaintiffs'-appellants' RICO claims on the ground that the plaintiffs'-appellants failed to establish the necessary enterprise element of a RICO claim (both substantive and conspiracy).

II.

STATEMENT OF JURISDICTION

This appeal is taken from an Opinion and Order of the United States District Court for the District of Oregon entered on October 2, 1998 and a subsequent Judgment of Dismissal entered on April 23, 1999. The Judgment of Dismissal is a [sic] subject to appeal under 28 U.S.C. §1291, which provides that the courts of appeal have jurisdiction of appeals from all final decisions of the district courts of the United States.

Although the Judgment of Dismissal was voluntarily entered, it is "clear that plaintiffs may appeal from a voluntary dismissal with prejudice, at least where the plaintiff is not acting pursuant to a settlement agreement

intended to terminate the litigation." *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995), *cert. dismissed*, 517 U.S. 1183, 116 S.Ct. 1710, 134 L.Ed.2d 772 (1996).

The Notice of Appeal was filed on April 30, 1999. As a result, this appeal is timely under Federal Rule of Appellate Procedure 4(a)(1).

III.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997). Thus, the appellate court's review is governed by the same standard used by the district court under Federal Rule of Civil Procedure 56(c). *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997).

The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Covey*, 116 F.3d at 834. The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *Id.* Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 1127, 1130 (9th Cir. 1995). Moreover, where different ultimate inferences can be drawn from the evidence submitted by the moving party, summary judgment is inappropriate. *Sankokich v. Insurance Company of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

IV.

STATEMENT OF THE CASE

Plaintiff appellants Larry Fessler and Susan Fessler (the "Fesslers") appeal from an Opinion and Order of the United States District Court for the District of Oregon entered on October 2, 1998 (the "Order"). A Judgment of Dismissal of the case was subsequently entered on April 23, 1999. In the Order, the district court granted partial summary judgment in favor of defendants-appellees Bayshore Realty, Inc. ("Bayshore"), Cory Comstock ("Comstock"), John C. Jensen ("Jensen") (collectively, the "Bayshore Defendants"), and David O. Quinn ("Quinn") and denied partial summary judgment to the Fesslers' on Bayshore's and Comstock's second counterclaim for intentional interference with business relations and third counterclaim for defamation – slander per se.

The Fesslers commenced this action by filing their Complaint in the district court on October 23, 1996. Subsequently, this Complaint was superseded by a Second Amended Complaint on December 10, 1997, which was the operative pleading at the time summary judgment was granted by the district court. In the Second Amended Complaint, the Fesslers alleged eight claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against various or all of the defendants-appellees and one claim for negligence against Quinn alone.

On March 27, 1998, plaintiffs-appellants and defendants-appellees filed cross motions for summary judgment. The Bayshore Defendants filed their Motion for Summary Judgment as to the Fesslers' RICO claims

against them. Quinn filed his Motion for Summary Judgment as to the Fesslers' RICO claims and negligence claim against him.

On April 14, 1998, the Fesslers filed their Response to the Bayshore Defendants' and Quinn's Motions for Summary Judgment, Concise Statement of Material Facts in Opposition to the Bayshore Defendants' and Quinn's Motions for Summary Judgment, and supporting affidavits and exhibits.

On April 21, 1998, the Bayshore Defendants filed their Motion for Leave to File Supplemental, Extended and Corrected Concise Statement and Underlined Exhibits and the Affidavit of David C. Lewis in Support of Motion to Resubmit Underlined Exhibits.

On April 22, 1998, Quinn filed his Reply to Plaintiffs' Response to Motion for Summary Judgment and supporting affidavits and exhibits.

On April 27, 1998, the Fesslers filed their Amended Concise Statement of Material Facts in Opposition to the Defendants' Motions for Summary Judgment.

On April 29, 1998, the Bayshore Defendants filed their Reply to the Fessler's Response to Defendants' Summary Judgment Motions and Objections to the Fesslers' Concise Statement of Facts and Exhibits.

The district court heard oral argument on the parties' motions on May 13, 1998 and June 3, 1998. The May 13, 1998 hearing centered on oral argument regarding the Bayshore Defendants' Motion for Summary Judgment and Quinn's Motion for Summary Judgment. The June 3,

1998 hearing centered on the Fesslers' Motion for Partial Summary Judgment.

On May 26, 1998, each of the parties filed supplemental memoranda on the applicability of *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996) to the Fesslers' RICO enterprise element. These supplemental memoranda were submitted pursuant to the district court's order of May 13, 1998 requesting additional briefing on this issue.

On October 2, 1998, the district court entered an Opinion and Order granting in part and denying in part the Bayshore Defendants' and Quinn's Motions for Summary Judgment and denying the Fessler's Motion for Partial Summary Judgment.

Thereafter, the Fesslers moved the district court for an order to allow them to pursue an interlocutory appeal and staying proceedings while this appeal was pending. The district court denied this motion. Thereafter, stipulations and voluntary dismissals were filed by the parties. These stipulations expressly reserved the Fesslers' right to appeal the district court's grant of summary judgment on the RICO claims. The district court entered a Judgment of Dismissal on April 23, 1999. The Fesslers filed a Notice of Appeal on April 30, 1999.

V.

STATEMENT OF FACTS

This case arises out of the purchase and sale of real property located in Waldport, Oregon. In 1992, the Fesslers began looking for investment property in Oregon. Bayshore Defendants' Concise Statement of Material

Facts at p. 1, lns. 24-26. To help them find an appropriate property, the Fesslers contacted Cory Comstock, a real estate broker who owns and manages Bayshore Realty. *Id.* at p. 2, lns. 1-5.

In July of 1992, the Fesslers became aware that John Jensen's house located at 102 N.W. Oceania was up for sale. *Id.* at p. 2, lns. 12-13. Bayshore and Comstock had managed and rented out this home before it was purchased by the Fesslers and provided for and supervised ongoing maintenance and repair work for Jensen. Plaintiffs' Concise Statement of Material Facts at p. 17, ¶1.

Prior to the property closing, Larry Fessler asked Comstock to recommend a property inspector. Bayshore Defendants' Concise Statement of Material Facts at p. 4, lns. 21-23. Comstock recommended only one inspector: David Quinn, Plaintiffs' Concise Statement of Material Facts at p. 18, ¶5.

On October 30, 1992, Quinn performed the property inspection. Bayshore Defendants' Concise Statement of Material Facts at p. 5, lns. 2-3. After making his inspection, Quinn prepared a report. *Id.* at p. 5, lns. 17-19. The report does not mention the extensive 104 running feet of dry rot and pest infestation, nor the fact that thousands of pounds of sand was in the attic, nor the face-stapled wood shingles on the roof. Plaintiffs' Concise Statement of Material Facts at p. 19, ¶9. Because the Fesslers were unaware of the extensive damage to the property, they went through with the purchase of the property.

After learning of the concealed damage, the Fesslers filed a lawsuit on September 20, 1993 in Lincoln County Circuit Court alleging common law fraud against

Bayshore, Comstock, and Jensen and breach of contract and negligence claims against Quinn, Bayshore Defendants' Concise Statement of Material Facts at p. 7, lns. 2-7. On July 21, 1994, the court granted Bayshore, Comstock, and Jensen summary judgment. *Id.* at p. 7, lns. 7-9.

The Fesslers' attorney, Frederick Ronnau, and Comstock both stated under oath that they did not have any dealings or contact with each other. Plaintiffs' Concise Statement of Material Facts at p. 21, ¶15. However, phone records obtained in this case evidenced a telephone call from Comstock to Ronnau that was immediately followed by a facsimile from Comstock to Ronnau. *Id.* Comstock later admitted that he had a face-to-face meeting with Ronnau during the time in which the Fesslers' appeal rights on the summary judgment were still pending (which Ronnau advised the Fesslers not to contest). *Id.*

On February 8, 1995, the remaining claims against Quinn for breach of contract went to trial. However, after an off-the-record conference in chambers, the Fesslers, by and through their new attorney, Judith Selich, were forced to dismiss their claims based on the fact that the court denied their request for a continuance of trial based on the disappearance of their expert witness, David Norby, who would have testified that Quinn failed to meet the requisite standard of care in preparing his inspection report. *Id.* at p. 22, ¶¶17-18. Subsequently, the Oregon Court of Appeals reversed and remanded the trial court's dismissal of the Fesslers' negligence claim, and this negligence claim was subsequently consolidated with the federal court action. *See.* Order at p. 9; *Fessler v. Quinn,* 143 Or.App. 397, 403 (1996).

After the Oregon state court case was dismissed as to all defendants, the Fesslers learned, for the first time, that Quinn had inspected other houses in the area and had failed to disclose significant defects which would be expected to be disclosed. *Id.* at p. 22, ¶20. The Fesslers also learned of several other home sales by Bayshore and Comstock and inspected by Quinn involving patently defective property inspections. *Id.* at pp. 22-23, ¶¶21-27

VI.

SUMMARY OF ARGUMENT

In this appeal, the Fesslers contend that the district court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss their RICO claims.

First, the Fesslers contend that the district court erred in finding that the doctrine of claim preclusion barred their RICO claims because evidence presented to the court demonstrated that they were not aware of facts enabling them to state a RICO claim until after the previous Oregon state court case had been dismissed.

Second, the Fesslers contend that the district court erred in finding that they failed to establish the existence of a RICO enterprise because the district court adopted an improperly restrictive view of their evidence of the existence of an enterprise.

Third, the Fesslers contend that the district court erred in finding that they failed to establish a pattern of racketeering activity because the district court failed to give proper consideration to the evidence of continuous, related activity by the defendants-appellees.

VII.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE DOCTRINE OF CLAIM PRECLUSION DOES NOT BAR THE FESSLERS FROM BRINGING THEIR RICO CLAIMS IN THIS CASE

In the Order, the district court granted the Bayshore Defendants' Motion for Summary Judgment on the ground that the Fesslers' RICO claims were barred under the doctrine of claim preclusion, as that doctrine is interpreted under Oregon law. The Fesslers contend that the district court erred in reaching this determination because the evidence presented to the district court showed that the Fesslers could not establish the requisite elements of their RICO claims until after the prior Oregon state action was dismissed.

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

As the moving party herein, the Bayshore Defendants had the burden of establishing any defenses by admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden can be discharged by showing there is an absence of evidence to support the nonmoving party's case on any essential element. *Id.* The inquiry is whether a reasonable trier of fact could find, by a preponderance of the evidence, that the moving party is entitled to a

verdict as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

The substantive law governing a claim determines whether a fact is material. *Anderson*, 477 U.S. at 248 (1986). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Service v. Pacific Elec. Contractors*, 890 F.2d 626, 630 (9th Cir. 1987). Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-631. If direct evidence produced by the non-moving party contradicts direct evidence produced by the moving party, the court must assume the truth of the non-moving party's evidence with respect to that fact. *Id.* at 631.

In that part of its Order granting summary judgment in favor of the Bayshore Defendants, the district court found that the doctrine of claim preclusion, as applied under Oregon law, barred the Fesslers from bringing their RICO claims because "[u]nder Oregon law, plaintiffs could have and should have brought these claims in state court." Order at pp. 16-17. However, the evidence presented to the district court clearly indicates that in granting summary judgment on the basis of claim preclusion, the district court failed to give adequate consideration to evidence presented by the Fesslers that their RICO claim had not even arisen as of the time the Oregon state case had been dismissed.

"In determining whether a prior state court action bars a subsequent federal action, the federal court must look to the res judicata principles of the state court in which the judgment was rendered," *Pedrina v. Chun*, 97

F.3d 1296, 1301 (9th Cir. 1996), *citing Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 80 (1984), *cert. denied*, 117 S.Ct. 2441 (1997).

Under Oregon law, a plaintiff who has prosecuted one action against a defendant through to final judgment is precluded from prosecuting another action against the same defendant "where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action." *Drews v. EBI Companies*, 310 Or. 134, 140 (1990), *quoting Rennie v. Freeway Transport*, 294 Or. 319, 323 (1982). Because claim preclusion is an affirmative defense, the defendant bears the burden of pleading and proving facts necessary to establish the defense. *Troutman v. Erlandson*, 287 Or. 187, 213 (1979).

A RICO act arises when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1390 (9th Cir. 1990). To establish a RICO claim under Section 1962(c), the plaintiff must be aware of facts establishing (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Sedima, S.P.L.R. v. Imrex Co., Inc.*, 473 U.S. 479 (1985); *Sun Savings and Loan Ass'n. v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987). RICO claims under Subsection (a) require that the plaintiff be injured by the use of or investment of racketeering income. *Nugget Hydroelectric, L.P. v. Pacific Gas and Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993). RICO conspiracy is proscribed under Subsection (d).

In granting the Bayshore Defendants' Motion for Summary Judgment, the district court erroneously assumed that the Fesslers' RICO claims were of such a nature as could have been joined in the first action. In reality, these RICO claims had not yet fully arisen as of the time the Oregon state court case was dismissed. In response to the Bayshore Defendants' Motion for Summary Judgment, the Fesslers presented the district court with evidence that they could not have brought their RICO claims against the Bayshore Defendants at the time the Oregon state court case was pending because they were not yet aware of the existence of other individuals who had similar experiences with the Bayshore Defendants. *See,* Plaintiffs' Amended Concise Statement of Material Facts at pp. 22-23, ¶¶19-27. Thus, the Fesslers could not have joined these RICO claims with the state law claims that were being litigated in that proceeding.

Had the Fesslers brought RICO claims against the Bayshore Defendants in the Oregon state court case without having first gained knowledge of facts showing the existence of a pattern of racketeering conduct on the part of the Bayshore Defendants, it is a virtual certainty that the Oregon state court and/or the Bayshore Defendants would have severely criticized the Fesslers for bringing such claims without having first verified that a good faith basis for these claims existed. As such, the fact that the Fesslers' only brought such claims after they had learned of facts allowing them to validly state such claims should not be grounds for preventing them from obtaining an adjudication of their rights with respect to the conduct alleged.

The district court also erred in finding that the Fesslers' RICO claims were based on the same factual transaction that was at issue in the Oregon state court case. While there is no dispute that both the district court case and the Oregon state court case center on the events surrounding the Fesslers' 1992 purchase of real property in Waldport, Oregon, the Fesslers' RICO claims alleged conduct by the Bayshore Defendants above and beyond this transaction and encompassed conduct directed at other individuals as well as conduct taking place during the Oregon state court case itself. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 20-22, ¶¶10-18; pp. 22-23, ¶¶19-27.

As a result, the district court's finding that the doctrine of claim preclusion bars the Fesslers from pursuing their RICO claims against the Bayshore Defendants in this action ignores the existence of evidence presented by the Fesslers showing that the Fesslers could not have brought these claims in the prior adjudication. At the very least, it is respectfully submitted that genuine issues of material fact exist as to whether the Fesslers had knowledge of sufficient facts that would have enabled them to state a RICO claim against the Bayshore Defendants while the Oregon state court case was pending.

On the one hand, the district court states that the Fesslers could and should have stated a RICO claim in the Oregon state court action because they could have stated such a claim at the time. Yet on the other hand, the district court holds (as shall be discussed below) that the Fesslers do not provide sufficient facts to state such a claim in the present case. Such inherent contradiction in the Order makes it clear that the district court's summary

judgment was improperly granted as to the Bayshore Defendants on the above grounds.

VIII.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE FESSLERS PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A RICO ENTERPPRISE

After granting summary judgment in favor of the Bayshore Defendants on the basis of claim preclusion, the district court granted partial summary judgment in favor of Quinn on the Fesslers' RICO claims against him on two main grounds. First, the district court found that the Fesslers failed to establish the existence of a RICO enterprise separate and distinct from the pattern of racketeering activity in which it engages.[1] Order at pp. 21-23. Second, the district court found that the Fesslers failed to establish the existence of a pattern of racketeering activity. Order at pp. 23-26. However, the district court erred in its application of the relevant law to the facts existing in this case. As a result, summary judgment on these bases was improper.

In discussing whether the Fesslers established the existence of a RICO enterprise, the district court relied in significant part on *Chang v. Chen*, 80 F.3d 1293 (9th Cir.

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[1] In the Order, the district court stated that in addition to serving as a basis for granting summary judgment in favor of Quinn, the Fesslers' failure to establish a RICO enterprise "also serves as an additional basis for granting summary judgment on plaintiffs' RICO claims in favor of the Bayshore defendants." Order at p. 23.

1996). Indeed, after the May 13, 1998 hearing on the defendants'-appellees' motions, the district court requested supplemental briefing on *Chang's* applicability to the issue before the court. However, by relying so heavily on *Chang*, the district court failed to give adequate consideration to other cases in this circuit directly on point with the Fesslers' case and instead adopted an unnecessarily restrictive view of what could constitute a cognizable RICO enterprise.

In *Chang*, the Ninth Circuit adopted "the majority interpretation of the enterprise element, which requires the organization, formal or informal, to be 'an entity separate and apart from the pattern of racketeering activity in which it engages.' " *Chang* at 80 F.3d at 1298, *quoting United States v. Turkette*, 452 U.S. 576, 583 (1981). Based on *Chang*, the district court held that "Plaintiffs allegations show there was no enterprise separate and apart from the alleged pattern of racketeering activity." Order at p. 23.

However, this finding ignores the Ninth Circuit's holdings in *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), *Webster v. Omnitron Int'l.*, 79 F.3d 776 (9th Cir. 1996), and *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988). In *Feldman*, which is specifically cited in *Chang* itself; the court held that involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure. 853 F.2d at 660. Likewise, *Webster* holds that "[t]he participation of a corporation in a racketeering scheme is sufficient, of itself, to give the enterprise a structure apart from the racketeering activity: corporate entities have a legal existence separate and apart from their participation in the

racketeering, and the very existence of a corporation meets the requirements for a separate structure." 79 F.3d at 786. *See also, Kirk* at 844 F.2d at 664 ("[T]he existence of a corporation fulfills the requirements of an ascertainable structure apart from the predicate racketeering activity.").

In also bears mentioning that *Chang's* restrictive application has been subject to criticism by both courts and commentators. In one recent district court decision in the Southern District of California, *Dumas v. Major League Baseball Properties, Inc.*, 1999 WL 398042 (S.D.Cal. 1999), the court denied defendants' motions to dismiss the plaintiff's RICO claims, finding that the plaintiff had sufficiently pleaded a RICO enterprise and pattern.

In so doing, the court observed that:

> The rationale behind *Chang's* holding lay in a concern that, absent allegations of a separate entity with a decision making structure, §1962(c)'s "enterprise" element would be rendered superfluous. *Id.* at 1229. If *Chang* were the only case on this matter, the Licensors would appear to have a conclusive argument. However, the case law on this matter is not so simply categorized. Indeed, *Chang* itself is a peculiar case in that the court reaffirmed the Ninth Circuit's rule put forth in *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), that "involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure." *Chang*, 80 F.3d at 1300. However, *Chang* sidesteps this holding by finding that the corporation alleged to be part of the association-in-fact, "played no

> role whatsoever, legal or fraudulent, in the operations of the alleged enterprise," *Id.*, at 1301. Furthermore, *Chang* is a case in which the plaintiff apparently did not even include the corporation as a defendant.
>
> * * *
>
> Clearly, those are not the facts in the instant matter. Casting doubt on the utility of *Chang*, one treatise reads: "Unless the court overrules *Feldman*, it will be very easy for plaintiffs to avoid the same pleading mistake in the future. Thus, it remains to be seen whether *Chang* results in any significant tightening of the Ninth Circuit's definition of an association in fact." David B. Smith and Terrence C. Reed. *Civil RICO*, ¶3.06, p. 3-64 (Matthew Bender 1998).

Here, the Fesslers alleged that Bayshore Realty, an Oregon corporation, was an integral participant in the racketeering scheme. In opposition to the defendants'-appellees' motions for summary judgment, the Fesslers presented evidence that Bayshore Realty defrauded them and other victims by participating in a scheme whereby inspections that were required for home financing were done in a manner which covered up the full extent of hidden dry rot or pest damage to homes so that they could be sold to unwitting buyers for sale prices far greater than their actual value. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 17-20, ¶1-9. As a result, the facts of this case were very different from those of *Chang*, where the real estate company in question was not even a defendant, let alone a participant.

Because the district court failed to recognize that the Fesslers had properly alleged and proved a RICO enterprise separate and distinct from the racketeering activity itself, the district court's grant of summary judgment was improper. As a result, the district court's Order should be reversed.

IX.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE FESSLERS PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A RICO PATTERN

In addition to finding that the Fesslers failed to establish the existence of a RICO enterprise, the district court also found that they did not demonstrate that Quinn engaged in a pattern of racketeering activity. However, the district court's analysis of the pattern requirement rested on an unduly restricted interpretation of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Because of this, the district court erred in granting summary judgment on this ground as well.

In the Order, the district court characterized the Fesslers' evidence as only showing that "Quinn missed numerous defects in the home plaintiffs purchased and several other homes." Order at p. 25, However, the Order fails to note that the Fesslers also alleged that the Bayshore Defendants engaged Quinn to inspect properties they listed to sell them for a profit. *See*, Plaintiffs' Amended Concise Statement of Material Facts at p. 18, ¶5 and p. 23, ¶23. Thus, the Order rests on an incomplete view of the Fesslers' claims which is unnecessarily restrictive.

Moreover, the district court also failed to construe *Northwestern Bell* in a manner consistent with the liberal construction set forth in *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990) and other cases in this circuit. In *Ikuno*, the Ninth Circuit found that a pattern was created by the filing of two allegedly false annual reports. In so doing, the court stated:

> Although there is no talismatic number of predicate acts needed to establish a pattern, two acts is a minimum. *Northwestern Bell*, 109 S.Ct. at 2899. Li's actions thus could create a pattern because "Congress envisioned circumstances in which no more than two predicates would be necessary to establish a pattern of racketeering." *Id.*
>
> * * *
>
> His actions also carried with them the threat of continuity. He was filing annual reports and there is no evidence that he would have stopped doing so if KLCL had not ceased to do business.
>
> * * *
>
> Being mindful that "RICO is to be read broadly," *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), we hold that sufficient evidence of a pattern was alleged to withstand a motion for summary judgment.

912 F.2d at 309.

This broad interpretation of what constitutes a pattern of racketeering activity is also found in *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991). In *Ticor*, the court affirmed a RICO judgment against two defendants,

engaged in three episodes of forging federal tax lien releases as part of a real estate fraud scheme:

> The RICO judgment against Shepard and Florida was based on tree [sic] episodes of forgery. These forgeries were related under the Supreme Court test, because they had both similar purposes and identical methods of commission. [citation omitted]. The forgeries also posed a threat of continued criminal activity. Shepard and Florida forged the three releases within a 13-month period. The frequencies of the forgeries suggests that this practice had become a regular way of conducting business at Realty, satisfying the continuity prong of the pattern test. [citations omitted]. Shepard and Florida argue that there could not have been a threat of continued criminal activity, because they obtained two legitimate lien releases on other properties subsequent to the last forged release. However, that Shepard and Florida obtained two legitimate releases does not demonstrate that they would not continue to forged [sic] releases if legitimate attempts to obtain releases were unsuccessful. Thus, we conclude that the district court was correct in holding that the three forgeries demonstrated a pattern of racketeering under RICO. *Id.* at 450-451.

Given the above, it is clear that the district court's application of *Northwestern Bell* to the facts of this case represented an unnecessarily restrictive approach to determining whether a pattern of racketeering activity existed. Because the district court adopted such a narrow approach, it failed to properly credit the Fesslers with

having established a pattern defeating summary judgment. As such, the district court's grant of summary judgment in favor of Quinn should be reversed.

X.

CONCLUSION

For all the foregoing reasons, the Fesslers respectfully submit that the record before the Court clearly demonstrates that the district court erred in granting summary judgment in favor of the defendants-appellees on the Fesslers' RICO claims. Pursuant thereto, the Fesslers respectfully request that the district court's Order be reversed.

DATED: September 3, 1999

MARKS & BROOKLIER

/s/ Donald B. Marks
DONALD B. MARKS
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Larry Fessler and Susan Fessler

STATEMENT OF RELATED CASES

The plaintiffs-appellants are not aware of any related cases pending before this Court.

MARKS & BROOKLIER

/s/ Donald B. Marks
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Larry Fessler and Susan Fessler

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32(e)(4)

I, DONALD B. MARKS, certify that pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 5760 words.

Executed on this 3rd day of September, 1999 at Los Angeles, California,

MARKS & BROOKLIER

/s/ Donald B. Marks
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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, 12th Floor, Los Angeles, California 90067.

On September 3, 1999, I served the foregoing document described as **APPELLANT'S OPENING BRIEF** on all parties in this action by placing the true copies thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully paid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

___ BY PERSONAL SERVICE

I caused such envelope to be delivered by hand to the offices of the addressee.

___ BY FAX

I caused such document to be transmitted via fax to the offices of the addressee.

___ STATE I declare, under penalty of perjury, under the laws of the State of California that the above is true and correct.

___ FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED on September 3, 1999 at Los Angeles, California.

/s/ Harold E. Frazier, Jr.
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35485

LARRY FESSLER and SUSAN FESSLER,

Plaintiffs-Appellants,

v.

BAYSHORE REALTY, INC. an Oregon corporation; CORY COMSTOCK, an individual; JOHN C. JENSEN, an individual; and DAVID O. QUINN, an individual,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

[Appeal from the United States District Court
for the District of Oregon]

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I.

INTRODUCTION

In their Answering Briefs, defendants-appellees Bayshore Realty, Inc. ("Bayshore"), Cory Comstock ("Comstock"), John C. Jensen ("Jensen") (collectively, the "Bayshore Defendants"), and David O. Quinn ("Quinn") attempt to refute plaintiffs-appellants Larry D. Fessler's and Susan D. Fessler's (collectively, the "Fesslers") arguments in favor of reversal of the District Court's grant of their motions for summary judgment by pointing to items in the record that they contend support their version of the facts. However, by arguing the facts, the Bayshore Defendants and Quinn actually show why triable issues of material fact exist and why summary judgment should have been denied.

Given the state of the record before this Court, and given the fact that compelling evidence exists supporting the Fesslers' claims (which may or may not be contradicted by other evidence presented by the defendants-appellees), it is readily apparent that summary judgment was improperly granted in this case. Accordingly, the District Court's order granted [sic] summary judgment should be reversed, and the Fesslers should be given the opportunity to proceed to a trial on the merits on their claims.

II.

THE BAYSHORE DEFENDANTS FAIL TO PRESENT THE COURT WITH A VALID BASIS UPON WHICH THE FESSLERS' EVIDENCE IN SUPPORT OF THEIR CLAIMS SHOULD BE IGNORED

The Bayshore Defendants devote a significant portion of their Answering Briefs pointing out evidence in the record before the Court supporting their position that the Fesslers were precluded from pursuing their RICO claims against them and that the Fesslers cannot establish the elements of their RICO claims. However, the appellees completely ignore other evidence also in the record rebutting their position and supporting the Fesslers claims. The existence of evidence both for and against the Fesslers' claims only highlights the fact that triable issues of material fact remain to be determined by the trier of fact and mandates that summary judgment be denied.

As mentioned in the Appellants' Opening Brief, the District Court's grant of summary judgment is reviewed *de novo. Covey v. Hollydale Mobilehome Estates,* 116 F.3d 830, 834 (9th Cir. 1997). Thus, in reviewing this record, this Court must view the evidence in the same manner that the District Court is obligated to do: *in the light most favorable to the nonmoving party. Id.* at 834 (italics added). The court must not weigh the evidence or determine the truth of the matter; instead, it must only determine whether there is a genuine issue for trial. *Id.*

In this appeal, the Fesslers contend that the District Court erred in granting the defendants'-appellees' Motion for Summary Judgment to dismiss their RICO

claims for three main reasons. First, the Fesslers contend that the District Court erred in finding that the doctrine of claim preclusion barred their RICO claims. Second, the Fesslers contend that the District Court erred in finding that they failed to establish the existence of a RICO enterprise because it adopted an improperly restrictive view of their evidence of the existence of an enterprise. Third, the Fesslers contend that the District Court erred in finding that they failed to establish a pattern of racketeering activity.

Each of these arguments are supported by specific evidence that was presented to the District Court, but not properly considered by it, in connection with the motion for summary judgment. Thus, the appellees' factual arguments notwithstanding, it is clear that the presence of highly material, compelling evidence in support of the Fesslers' position compelled the District Court, and should compel this Court, to deny summary judgment.

These citations to the record are discussed at some length in the Appellants' Opening Brief and need not be repeated in full here. However, because the Bayshore Defendants and Quinn have chosen to utterly ignore their presence, a brief discussion of these matters is appropriate.

In their Answering Brief, the Bayshore Defendants contend that no evidence before the District Court supported the Fesslers' arguments against the application of the doctrine of claim preclusion in this case. However, in response to the Bayshore Defendants' Motion for Summary Judgment, the Fesslers presented the District Court with evidence that they could not have brought their

RICO claims against the Bayshore Defendants at the time the Oregon state court case was pending because they were not yet aware of the existence of other individuals who had similar experiences with the Bayshore Defendants. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 22-23, ¶¶ 19-27. The Fesslers also presented the District Court with evidence that their RICO claims were not only based on the events surrounding their 1992 purchase of real property in Waldport, Oregon, but also on conduct by the Bayshore Defendants above and beyond this transaction directed at both themselves and other individuals up through the conclusion of the Oregon state court case itself. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp 20-22, ¶¶ 10-18; pp. 22-23, ¶¶ 19-27.

In granting summary judgment, the District Court appears to have ignored these facts or else erroneously made credibility determinations in disregarding them. In their Answering Brief, the Bayshore Defendants essentially repeat this error by arguing that certain general statements made by Mr. Fessler during his deposition and/or documents produced during discovery constitute "admissions" of his knowledge of the viability of RICO claims during the time the Oregon state court action was pending. However, a review of these statements and documents, in their proper context, reveals that the Bayshore Defendants' contentions are based on a mischaracterization of the actual facts.

For example, the Bayshore Defendants argue that "[d]espite plaintiffs' belief beginning as early as April 1993 that defendant[s] were involved in a conspiracy, plaintiffs chose not to bring the conspiracy, in the form of

a RICO claim or otherwise, to the court's attention at any time during the pendency of the state case." Bayshore Defendants' Answering Brief at p. 34. However, the actual evidence relied upon demonstrates no such thing. Instead, this evidence, consisting of highly generalized statements made by Mr. Fessler in his deposition and a written narrative prepared by Mrs. Fessler, only demonstrates that the Fesslers believed that some form of wrongdoing involving the appellees had occurred. It does not show that the Fesslers, or their attorney at the time, had knowledge of specific facts sufficient for them to have alleged a RICO conspiracy claim.

It also misapprehends the fact that RICO conspiracy differs from "ordinary" conspiracy in that the conspiracy required to be alleged is one to conspire to engage in a pattern of racketeering activity rather than simply conspiring to commit a bad act, which need not be part of a "pattern" nor "racketeering activity". Thus, even if one assumes, *arguendo*, that sufficient evidence existed for the Fesslers to have alleged a conspiracy claim in their Oregon state court case (which, given the evidence, is not true in any event), this does not equate to having sufficient knowledge to allege a RICO conspiracy claim. Thus, the appellees' argument is meritless.

As the moving party herein, the Bayshore Defendants had the burden of establishing any defenses by admissible evidence. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To meet this burden, the Bayshore Defendants were required to show the *absence* of evidence to support the nonmoving party's case on any essential element. *Id.* (italics added). Because the Fesslers presented the District Court with direct factual evidence supporting their

claims, the Bayshore Defendants could not meet this burden as a matter of law. The Bayshore Defendants only prevailed because the District Court improperly weighed the evidence and failed to resolve doubts as to the existence of a material factual issue against the moving party. As a result, the District Court's order must be reversed.

III.

QUINN FAILS TO PRESENT THE COURT WITH A VALID BASIS UPON WHICH THE FESSLERS' EVIDENCE IN SUPPORT OF THEIR CLAIMS SHOULD BE IGNORED

Like the Bayshore Defendants, Quinn's Answering Brief is primarily centered on pointing out portions of the factual record supporting his defenses to the Fesslers' RICO claims. However, like the Bayshore Defendants' arguments, Quinn's arguments are easily rebutted by the presence of other evidence supporting them.

In the Order granting summary judgment, the District Court characterized the Fesslers' evidence as only showing that "Quinn missed numerous defects in the home plaintiffs purchased and several other homes." Order at p. 25. However, the Order failed to note that the Fesslers also alleged that the Bayshore Defendants engaged Quinn to inspect properties they listed to sell for a profit. *See*, Plaintiffs' Amended Concise Statement of Material Facts at p. 18, ¶ 5 and p. 23, ¶ 23. Thus, the Order rests on an incomplete view of the Fesslers' claims.

Such a view also necessarily implies construing evidence in a manner *least*, rather than most, favorable to the

Fesslers. Under well-established summary judgment doctrine, such a presumption is incorrect as a matter of law.

Such a view is also contradicted by the law in this circuit, such as *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990), *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991), where this Court found that a RICO pattern was created by the filing of two allegedly false annual reports and three episodes of forging federal tax lien releases as part of a real estate fraud scheme, respectively.

Given the above, it is clear that the District Court adopted an unnecessarily narrow approach to this issue and failed to properly credit the Fesslers with having established a pattern defeating summary judgment.

The Answering Briefs of both the Bayshore Defendants and Quinn also fail to adequately address legal authority raised by the Fesslers that refutes the legal authority relied upon by them in their moving papers regarding the enterprise element of the Fesslers' RICO claims. A great deal of emphasis is placed by the appellees (as it was by the District Court) on *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996), which is treated by both the Bayshore Defendants and Quinn as well-settled law in this circuit. However, it is clearly not.

In *Chang*, the Ninth Circuit adopted "the majority interpretation of the enterprise element, which requires the organization, formal or informal, to be 'an entity separate and apart from the pattern of racketeering activity in which it engages.' " *Chang* at 80 F.3d at 1298, *quoting United States v. Turkette*, 452 U.S. 576, 583 (1981). Based on *Chang*, the district court held that "Plaintiffs allegations show there was no enterprise separate and apart from the alleged pattern of racketeering activity." Order at p. 23.

However, this finding ignores this Court's holdings in *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), *Webster v. Omnitron Int'l.*, 79 F.3d 776 (9th Cir. 1996), and *United States v. Kirk*, 844 F.2d 660 (9th Cir. 1988). In *Feldman*, which is specifically cited in *Chang* itself, the court held that involvement of a corporation which has an existence separate from its participation in the racketeering activity can satisfy the enterprise element's requirement of a separate structure. 853 F.2d at 660. Likewise, *Webster* holds that "[t]he participation of a corporation in a racketeering scheme is sufficient, of itself, to give the enterprise a structure apart from the racketeering activity: corporate entities have a legal existence separate and apart from their participation in the racketeering, and the very existence of a corporation meets the requirements for a separate structure." 79 F.3d at 786. *See also, Kirk* at 844 F.2d at 664 ("[T]he existence of a corporation fulfills the requirements of an ascertainable structure apart from the predicate racketeering activity.").

In this action, the Fesslers alleged that Bayshore Realty, an Oregon corporation, was an integral participant in the racketeering scheme. In opposition to the defendants'-appellees' motions for summary judgment, the Fesslers presented evidence that Bayshore Realty defrauded them and other victims by participating in a scheme whereby inspections that were required for home financing were done in a manner which covered up the full extent of hidden dry rot or pest damage to homes so that they could be sold to unwitting buyers for sale prices far greater than their actual value. *See*, Plaintiffs' Amended Concise Statement of Material Facts at pp. 17-20, ¶¶ 1-9. As a result, the facts of this case are very

different from those of *Chang*, where the real estate company in question was not even a defendant, let alone a participant.

Feldman, *Webster*, and *Kirk* remain good law in this circuit and appear to have greater applicability to the facts of the instant case. As such, the appellees' attempt to characterize *Chang* as the first and last word on the issue of enterprise is wholly disingenuous. This Court need not, and should not, defer to *Chang*'s strongly criticized holding. Instead, this Court should find that the rationales of *Feldman*, *Webster*, and *Kirk* are appropriate here and reverse the District Court's grant of summary judgment on this basis as well.

IV.

CONCLUSION

For all the foregoing reasons, the Fesslers respectfully submit that the record before the Court clearly demonstrates that the district court erred in granting summary judgment in favor of the defendants-appellees on the Fesslers' RICO claims. Pursuant thereto, the Fesslers respectfully request that the District Court's Order be reversed.

DATED: November 19, 1999

MARKS & BROOKLIER

/s/ Donald B. Marks
DONALD B. MARKS
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Larry Fessler and
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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32(e)(4)

I, DONALD B. MARKS, certify that pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 32-I, the attached Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 2538 words.

Executed on this 19th day of November, 1999 at Los Angeles, California.

/s/ Donald B. Marks
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PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, Suite 1200, Los Angeles, California 90067.

On November 19, 1999, I served the foregoing document described as

APPELLANT'S REPLY BRIEF on all parties in this action by placing the true copies thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

X BY MAIL

I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid – I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully paid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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I caused such envelope to be delivered by hand to the offices of the addressee.

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_ STATE I declare, under penalty of perjury, under the laws of the State of California that the above is true and correct.

X FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED on November 19, 1999, at Los Angeles, California.

/s/ Harold E. Frazier
HAROLD E. FRAZIER, JR.

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